1941 *Present :* **de Kretser and Wijeyewardene JJ.**

NOORDEEN *et al. v.* BADOORDEEN *et al.*

42—5—D. C. Colombo, 1,073

Fidei commissum—*Last will of Muslim testator—No prohibition against alienation*—Fidei commissum *simplex—Roman-Dutch law.*

Where the last will of a Muslim testator contained the following clause :—

"I bequeath to my daughter P, the premises . . . . so that she may enjoy the income thereof. After her death, these properties will go to her children, and if she leaves no children, then the husband's share according to religion being set apart, what is left will go to the benefit of the relatives in the paternal line and entitled to inherit."

P died issueless. Her husband predeceased her.

Held, that the will must be construed in accordance with the principles of the Roman-Dutch law and that the intention of the testator was that the property should devolve on P subject to a *fidei commissum* in favour of her children.

Held, further, that the clause created two separate *fidei comissa*, one in respect of a half share in favour of P's husband and the other in respect of the half share in favour of the relatives.

The *fidei commissum* in favour of P's husband lapsed at the death of P and therefore a half share became absolutely vested in her at her death.

THIS was an action for the partition of a land of which the owner was Meera Neina who died in 1892 leaving a last will under which he devised it to his daughter Pitchammal subject to certain conditions and limitations. Pitchammal died without issue in September, 1937. Her husband predeceased her in 1935.

The question was whether the last will, the material words of which are given in the headnote, created a valid *fidei commissum*.

The learned District Judge held that the last will did not create a valid *fidei commissum* and that the property belonged exclusively to the fourth defendant.

He dismissed the plaintiff's action.

L. M. D. de Silva, K.C. (with him *C. E. S. Perera* and *A. H. M. Ismail*), for plaintiff, appellant in appeal No. 42 and respondent in appeal Nos. 43, 44, 45.—The question for decision is whether a clause in the will of a Muslim residing in Ceylon but a native of Tinnevelly in South India created a *fidei commissum*.

In construing a will the primary consideration is the intention of testator (*Censura Forensis 1.3.7.7.*). All the surrounding circumstan may be looked at for the purpose of ascertaining this.

The word used to designate the beneficiaries in this will is "Sokkara

The experts translate this word as "Agnates on the father's side entit to inherit property". This definition is supported by all the Ta Dictionaries. Vide *Winslow's Tamil Dictionary.* Agnates in Muslim l are described in *Ameer Ali (4th ed.), Vol. IV at pp. 68 and 72. Section* deals with agnatic male relations.

Relatives mean an ascertainable class. *Burge (4th ed.), Vol. IV p. 768.* Substitution may be in favour of a class. At page 773 sometir this is equivalent to substitution according to the law of Intest Succession. *Vide* Sande's Frisian Decisions (*De Vos Edition*) 4.5.2.

In interpreting a document, the document must be looked at as whole—(*Sinnan Chettiar v. Mohideen*[1]). In *Amaratunga v. Alw* Soertsz J. says there is no need to go on a "voyage of discovery" ascertain the class to be benefited. But a liberal construction should given to the words, 3 Nathan, p. 1902 para. 1881.

No words of express prohibition are necessary to create a *fid commissum.* The law does not require an express restraint on alienatic Vander Linden 1.9.8. Restraint may be by implication. *Walter Perei Vol. (II.), p. 431.*

Udumalevvai v. Mustapha[2] is a parallel and almost indistinguishab case where the restraint is by implication. *See* the older ca *Vyramuttu v. Mootatamby*[3]. Here too there are no express words restraint. The copy of translation of the deed clearly proves this.

In *Udumalevvai v. Mustapha (supra)* a deed of gift by a Muslim h the words "to possess and enjoy as his own from day to day". The it was held that there was a *fidei commissum.*

The learned District Judge is clearly wrong when he calls this a simple *fidei commissum* as distinguished from duplex.

The reference to simplex and duplex *fidei commissa* is in *Voet 36.1.* The Simplex *fidei commissum* was a local law peculiar to the province Amsterdam. It was never introduced to other parts of Holland. So cannot be the law in Ceylon. In *Perera v. Perera*[5] Bertram C.J. state specifically that it was not introduced to Ceylon.

In *Karonchihamy v. Angohamy*[6] it was held that the whole of th Roman-Dutch law was never introduced to Ceylon.

In *Weerasekera v. Pieris*[7], it was held that a Muslim could creat a valid *fidei commissum.* This was followed in *Sultan v. Pieris*[8].

In a *fidei commissum* when does vesting take place ?

Is it at the death of the testator or Pitchammal ?

See *Voet 36.1.26 ; 3 Nathan 1908 ; Maasdorp Summary 183.*

[1] *15 C. L. W. 109, at pp. 112 and 113.*
[2] *40 N. L. R. 363.*
[3] *34 N. L. R. 46.*
[4] *23 N. L. R. 1.*
[5] *20 N. L. R. 463.*
[6] *8 N. L. R. 1.*
[7] *34 N. L. R. 281.*
[8] *35 N. L. R. 57 at p. 79.*

There is here a complete *fidei commissum.* The intention of the testator is clear, the property is clearly designated and the beneficiaries are an ascertainable class "the male agnatic relations entitled to inherit the property".

H. V. Perera, K.C. (with him *W. S. de Saram, F. A. Tisseverasinghe, L. A. Rajapakse, P. Thiagarajah,* and *B. C. Ahlip*), for fourth defendant, respondent.—The intention of a testator cannot be arrived at by conjecture. A conjecture is a guess. It is a matter outside the documet itself. You cannot interpolate words to give a different meaning. No words should be interpolate into a will—*Galliers v. Kycroft* [1].

Intention must be clear. The Court should not allow the addition or interpolation of words. (*Walker v. Tipping* [2]).

Testator was a Muslim of Tinnevelly. Muslims are governed by the Muslim law. Conceptions of the Roman-Dutch law should not be incorporated into Muslim wills unless there is a clear indication that this was intended.

If such words as "under the bond of *fidei commissum*" are used then the Roman-Dutch law would apply. You will have to strain the Roman-Dutch law to apply it to Muslims.

There is no reason to resort to other systems of law when Muslim law suffices—*Abdul Rahiman v. Ussan Umma* [3], *Balkis v. Perera* [4].

The Privy Council in *Weerasekera v. Peiris* (*supra*) did not differ from this general principle though it decided in favour of a *fidei commissum* in the particular case. There is no express prohibition against alienation and when there is a doubt as to whether a substitution in a testament was direct or fiduciary the former is presumed to have been intended, *Voet 36.1.1.*

If words are capable of more than one interpretation, the intention is not clear. Frisian Decisions (De Vos Edition) p. 57.

A native of Tinnevelly is not likely to know the complicated system of the Roman-Dutch law.

In any case the *fidei commissum* lapses as the class to be benefited, is vague and uncertain. Is it the father's agnates or daughter's agnates? "Voyage of discovery" to ascertain a class is unwarranted. *Amaratunga v. Alwis* (*supra*).

In defining agnates the translators have given their own gloss to the word. The Court will ignore this.

Udumalevvai v. Mustapha (*supra*) deals with a deed and not a will, hence the principles that apply are different.

The law is in favour of a free disposition of property rather than in fettering it and the law should not be strained to effect a *fidei commissum.*

Though no express words of prohibition are necessary to create a *fidei commissum,* there must be a clear intention on the part of the testator to prohibit alienation.

The *fidei commissum* simplex was introduced into Ceylon, (*Perera v. Perera* [5]).

Such a *fidei commissum* contains a pious wish regarding tying up of property. It is not a *fidei commissum* at all in the real sense of the word

[1] *3 Balasingham Reports 74.*
[2] *9 Hare Reports 800.*
[3] *19 N. L. R. 175.*
[4] *29 N. L. R. 284.*
[5] *20 N. L. R. 403.*

Even if there was a *fidei commissum* regarding half the property no *fidei commissum* attaches to the husband's share. The husband's share is at least free from restraint. It is excluded but there is no giving over of such share to any beneficiaries.

L. M. D. de Silva, K.C., in reply.—Mcgregor's *Translation of Voet Commentaries on fidei commissum* p. xi. contains a useful distinction "doubt must not be confounded with difficulty" [1].

In Amaratunga v. Alwis [1] certain expressions had to be deleted in order to arrive at the class of beneficiaries. The law does not warrant this.

If the parties are insufficiently designated the *fidei commissum* does not fail. The parties can be designated according to the rules of law, *vide Voet 36.1.32.*

Translators are entitled to explain words (*Wirasinghe v. Rubeyat Umma* [2]).

Next of kin mean heirs *ab intestato, Maasdorp Vol. (1) 216.*

Muslim may be governed by the Roman-Dutch law (*Weerasekera v. Pieris* (*supra*) *and Sultan v. Pieris* (*supra*).

Re Time for vesting in *fidei commissum see Voet 36.1.26.*

There are no separate *fidei commissa.* The words "the balance" are decisive. Husband gets no share according to Muslim law unless he survives the wife. Here husband predeceased wife.

See Ramanathan v. Saleem [3]; *Udumalevvai v. Mustapha* (*supra*) is an indistinguishable analogy to the present case.

N. E. Weerasooria, K.C. (*with him Dodwell Gunawardana*), for first and second respondents in appeals Nos. 42, 44, 45, and appellants in appeal No. 43.

N. Nadarajah (with him *M. M. I. Kariapper* and *H. W. Thambiah*), for third defendant, respondent in appeals Nos. 42, 44, 45, and appellant in No. 44.

Cur. adv. vult.

May 5, 1941. WIJEYEWARDENE J.—

This is an action instituted under Ordinance No. 10 of 1863 (Legislative Enactments, Volume II., Chapter 56) in respect of a property in 2nd Cross street, Pettah, Colombo.

One Meera Neina was admittedly the original owner of the property. He died about 1892 leaving a last will P 1 which was duly proved. By the last will Meera Neina devised the property to his daughter Pitchammal subject to certain conditions and limitations. Pitchammal died issueless in September, 1937. Her husband predeceased her in 1935.

The case for the plaintiff and the first, second, third, and fifth defendants is that Pitchammal acquired the property burdened with a *fidei commissum.* They state that on Pitchammal's death the property devolved on Abdul Raoof and Abdul Cader by virtue of that *fidei commissum.* Abdul Cader conveyed his share to the plaintiff and the first and second defendants by deed P 12 of November 12, 1937. By deed No. 391 of November 24, 1937, Abdul Raoof disclaimed any right or title to the property and Abdul Cader claiming then to have become entitled to that half share under the joint operation of the last will and the deed of

[1] *40 N. L. R. 363.* [2] *16 N. L. R. 369.* [3] *42 N. L. R. 80.*

disclaimer conveyed it to the third defendant by deed No. 1405 of December 20, 1937. Abdul Raoof was adjudicated an insolvent in 1933, and the fifth defendant, the assignee in insolvency, caused a half share of the property to be sold by public auction when one Nadarajan Chettiar became the purchaser. The present appeals, however, are not concerned with the legal effect of the deed of disclaimer or the conflicting rights of the third and fifth defendants and Nadarajan Chettiar.

According to the fourth defendant, Pitchammal was entitled to the property absolutely in 1937 when she gifted it to M. A. Othuman by deed 4 D 2 of May 20, 1937. By deed 4 D 3 of October 7, 1937, Othuman gifted the property to the fourth defendant.

The District Judge held that the last will P 1 did not create a *fidei commissum* and that the property belonged exclusively to the fourth defendant. He dismissed the plaintiff's action with costs. These appeals have been preferred against that judgment.

It is also necessary to state a few facts about the relatives of Meera Neina living at the time of the death of Pitchammal. Meera Neina had two brothers Mohamadu Alia and Kidar Mohamadu and a sister, Mohideen Pathumma. Mohamadu Alia, his sons and grandsons predeceased Pitchammal. Kidar Mohamadu, his sons and all his grandsons except Abdul Raoof and Abdul Cader predeceased Pitchammal. Neither Mohideen Pathumma nor her descendants were alive in 1937.

The questions of law that arise for decision on this appeal are:—

(i.) Is the last will to be interpreted according to Muslim law or the Roman-Dutch law ?

(ii.) Does the last will create a *fidei commissum* ?

(iii.) Even if the last will creates a *fidei commissum* in favour of Pitchammal's children is there a further *fidei commissum* coming into operation on the death of Pitchammal without children ?

(iv.) If there is such further *fidei commissum* what is the share, if any, to which Abdul Raoof and Abdul Cader become entitled ?

The last will P 1 is written in colloquial Tamil apparently by the testator himself who was a native of South India. The plaintiff called three experts to give evidence as to the meaning of the relevant words in the will and they submitted translations P 2, P 3, and P 4. The fourth defendant called two experts as witnesses and one of them submitted a translation 4 D 4. There is also available a further translation 4 D 1 filed in the testamentary case in which the last will was proved.

The words and phrases which have given rise to conflicting legal arguments are :—

(1) Pillaikki

(2) Allathu

(3) Sokkaran

(4) Thakappanai Seratha Sokkaranakku.

I agree with the learned District Judge that in the last will—

(*a*) "Pillaikki" should be translated as "children"

(*b*) "Allathu" meant "if not" and conveyed the meaning "if she had no children"

(*c*) "Sokkaran" is plural in meaning.

The District Judge has translated "Sokkaran" as "relatives" and not "relatives entitled to inherit" as contended for by the plaintiff. The evidence led by the plaintiff shows that the idea of "being entitled to inherit" is inherent in the word "Sokkaran". This evidence receives strong support from Winslow's Tamil and English Dictionary which is accepted as a standard dictionary. That gives the meaning of the word as "male heirs to one's property". One of the experts called by the fourth defendant, Mr. Nalliah, who submitted the translation 4 D 4, has himself stated in answer to questions put by the Judge—

> "Sokkaran" means "relatives" or relatives who have the right to get the property. Sokkaran implies the fact that the relative is one who has a right to get the property. All the relatives on the paternal side cannot be said to have right to the property.

I am not prepared to attach much importance to the evidence of the other expert witness called by the fourth defendant. He has not submitted a translation and does not appear to have given the subject much thought. His evidence tends unfortunately to create the impression—as found by the District Judge in, at least, one instance that he is not disinclined to give "very fanciful meanings" to words in support of the case for the fourth defendant.

I hold that "Sokkaran" means "relatives entitled to inherit". The words "Thakappanai Seratha Sokkaranakku" would then mean to "relatives in the paternal line and entitled to inherit".

A phrase to phrase translation of the relevant passage in the last will would then be :—

En Kannukku Piraku	..	After my death
En makal Pitchammalukku	..	to my daughter Pitchammal
Pira Kotte rendam Kurukku theru		Pettah, 2nd Cross street
32 number Kittangiyum	..	No. 32 Godown
Kompany thiru ..	..	Slave Island
70 number veedum	..	House No. 70
Irandaium ..	..	Both
Rupai 11,000 ..	..	Rs. 11,000
Perumathi poddu ..	..	Having valued at
Nankodaiyai eluthiyum	..	Give as a gift in writing
Varumanam thinkavum	..	to enjoy the income
Avalakku piraku ..	..	After her
Aval pillaikki ..	..	to her children
Allathu ..	..	if she has no children
Markam pol ..	..	According to religion
Purusannakku panku poka	..	Husband's share having been separated
Meetham ..	..	what is left
Thakappanai sherntha sokkaran-akku ..	..	to relatives in the paternal line and entitled to inherit
Upayokapadavumakavum	..	for (his or their) benefit

The passage may therefore be translated into English as follows :—

> I bequeath to by daughter, Pitchammal, the premises . . . . so that she may enjoy the income thereof. After her death these properties will go to her children ; and if she leaves no children then, the husband's share according to religion being set apart, what is left will go to the benefit of the relatives in the paternal line and entitled to inherit.

It was contended by the Counsel for the fourth defendant that the Muslim law governed the last will in question as the testator was a Muslim. I do not think that contention is tenable in view of the long and inveterate practice in our Courts to have recourse to the principles of Roman-Dutch law in the construction of Muslim wills (see judgment of Schneider J. in *Abdul Rahiman v. Ussan Umma*[1] and judgment of Drieberg J. in *Balkis v. Perera*[2]). There have been, no doubt, conflicting decisions with regard to the law deciding the validity of Muslim deeds of gift after the ruling of the Privy Council in *Weerasekere v. Pieris*[3]. But in none of these decisions has it been questioned that even in the case of Muslim deeds of gift the validity of the restrictive clauses should be considered in accordance with the principles derived from the Roman-Dutch law (see *Sultan v. Pieris*[4]).

As the last will contained no express prohibition against alienation by Pitchammal, Mr. H. V. Perera argued that there was no *fidei commissum* and further relied on the well known principle that where there was any doubt as to whether a substitution in a testament was direct or *fidei commissary* the former should be presumed to have been intended (*Voet 36.1.1*).

With regard to these general rules it is sufficient to state that there is no uncertainty about them as they are clearly laid down by Voet for the guidance of those charged with the interpretation of documents. It should, however, be remembered as pointed out in a South African case (*vide* McGregor's translation of *Voet's Commentaries* on *fidei commissa* p. 11) that "doubt must not be confounded with difficulty". Moreover, there is the rule overriding all other general rules that "in *fidei commissa* the essential thing that is taken into account is the intention of the testator and it is not only his verbally expressed intention that is looked to but also that intention which is tacit and may be deduced from the words used as a necessary or manifest consequence". (*Censura Forensis 1.3.7.7.8.*)

In this connection it is interesting to note that Voet himself states, after giving the various general rules :—

> "It is commonly laid down that *fidei commissa* are odious in respect of the person burdened, and are strictly interpreted and must not be extended from person to person nor from one case to another ; and this contention must be allowed if circumstances do not point in another direction, as has been made clear in the different cases we have already examined, specially since the testator's wishes ought to be regarded

[1] *19 N. L. R. 175.*
[2] *29 N. L. R. 284.*
[3] *34 N. L. R. 281.*
[4] *35 N. L. R. 57, at p. 79.*

and observed above everything else and consequently these general rules about the interpretation of *fidei commissa* often have a certain use but often also are fallacious."

I do not think that the law requires an express restraint on alienation for the purpose of creating a *fidei commissum*. The definition of a *fidei commissum* given by Vander Linden (1.9.8.) negatives such a proposition. Dealing with *fidei commissa,* Vander Linden says, "Sometimes also a person is appointed heir under the condition that the property after his death shall pass to another ; this is termed a *fidei commissum*". The true position appears to be that such a restraint need not be in express terms but may be gathered by implication. Walter Pereira says in his Laws of Ceylon (194 Edition, Vol. 2, page 431) that a complete and effectual *fidei commissum* is created by the words, "I give my property to A subject to the condition that it is to become B's property after the death of A". I do not think it makes any difference if the words "subject to the condition" given in that illustration are omitted and the testator says, "I give my property to A and on his death the property shall go to B". The words "subject to the condition" are, in my opinion, impliedly contained in the latter instance. I do not see any reason why different legal consequences should flow because in one case the words "subject to the condition" occur, while in the other case the idea conveyed by these words could only be inferred by necessary implication. Moreover, there are local decisions which show that this Court did not attach any special significance to the omission of these words

In *Umma Levvai v. Mustapha*[1] Drieberg and Akbar JJ. held that a Muslim deed of gift containing the following words created a valid *fidei commissum* :—

> "I do hereby give by way of donation the properties . . . . They shall possess and enjoy the said properties as their own from this day for ever and in case any one of them happen to die without issue the shares will have to go to all my male children. I do hereby give away by way of donation the above-named properties to my sons and their heirs, executors, administrators and assigns. They shall possess and enjoy the said properties as their own from this day for ever".

In an earlier case *Vyramuttu v. Mootatamby*[2] Schneider J. held that a *fidei commissum* was created by the provision "the share of A should be possessed and enjoyed by him during his life time and after him the same should go to the children of the other two sisters". In view of certain passages in the judgment which gave rise to some doubt whether the words "subject to the condition" did not occur in the deed considered in that case, I read carefully a true copy of the translation of that deed produced at the argument before us and found that, in fact, those words were not contained in that deed.

It was next urged by the Counsel for the fourth defendant that if the last will P 1 created a *fidei commissum* it was a *fidei commissum* referred to in *Voet* (*36.1.5.*) as a *fidei commissum* simplex, and that the clause "after her death these properties will go to her children" did not

[1] *34 N. L. R. 46.*

[2] *23 N. L. R. 1.*

constitute a complete *fidei commissum* or *fidei commissum* duplex but had only the legal effect of prescribing or defining the succession in the absence of any disposition of the property by Pitchammal. A great deal of what has been stated earlier in this judgment on the question of *fidei commissa* is relevant to a consideration of this argument. I would add that neither in *Vyramuttu v. Mootatamby* (*supra*) nor in *Uduma Levvai v. Mustapha* (*supra*) did the Judges take the view that the *fidei commissarii* in those cases had the power to alienate. In *Perera v. Perera* [1] the Court considered specifically the law with regard to a *fidei commissum* simplex.

In that case a person gifted his property to three of his children and "their heirs and assigns as children and grandchildren, to be possessed or to be dealt with as they pleased subject to the direction herein mentioned below". The deed then provided, *inter alia*, that if one or two of the donees died without leaving a descendant, their shares should devolve on the survivor ; and that if all three donees died without leaving any descendants the property should pass to another branch of the family. The deed contained no prohibition against alienation. Bertram C.J. and Shaw J. set aside the finding of the District Judge that the deed created only a *fidei commissum* simplex. In the course of his judgment Bertram C.J. said :

> "It is clear, therefore, that the law of Holland recognized a *fidei commissum* of the nature here found by the District Judge and if appropriate words are used for that purpose, I presume that such a *fidei commissum* will be recognized by the law of the Colony. I think, however, that there are very strong reasons against giving this interpretation to the bare words used in this case.
>
> In the first place, if we were to do so, we should be introducing into the Colony, for the first time, a form of tenure of property which is wholly unfamiliar both here and in England, with which legal system our own is bound up. I venture to say that it would be thought a contradiction in terms that any person should be conceived as having a life interest in a property and at the same time as having the power to dispose by deed or by will of the whole dominium . . . . That form of tenure may exist in Holland in certain circumstances. But I think it would require much more definite words than we have in the case to induce us in any particular case to hold that it was intended in Ceylon."

In an appropriate case it may become necessary to examine more closely the exact scope of the law as stated by Voet with regard to a *fidei commissum* simplex. A *fidei commissum* simplex appears to have been a form of *fidei commissum* recognized in the local laws of Amsterdam and the question will have to be considered carefully whether such a *fidei commissum* prevailed in Ceylon. In this connection I would refer to the observation of De Sampayo J. in *Karonchihamy v. Ango Hamy* [2] that while it is true as a general proposition that the Roman-Dutch law prevailed in Ceylon under the Dutch Government "it is more correct to say that what so prevailed was not the whole body of Dutch laws, including legislation due to the peculiar circumstances of time and place,

[1] *20 N. L. R. 463.*

[2] *8 N. L. R. 1.*

but only what may be called the Common Law of Holland or so much of it as was suitable to local needs and circumstances ". For the purpose of this case it is not necessary to go any further than the learned Judges did in *Perera v. Perera* (*supra*) to hold against the contention of the fourth defendant that the *fidei commissum* in this case is of the limited nature of a *fidei commissum* simplex.

I hold for the reasons given by me that by the last will the testator has given legal effect to his intention that the property in the first instance should devolve on Pitchammal subject to a *fidei commissum* in favour of her children and that Pitchammal should have no power to alienate the property.

The question has now to be considered whether the *fidei commissum* lapsed entirely or partly on the death of Pitchammal without children. In the first place I do not think there is any uncertainty with regard to the beneficiaries indicated by the word Sokkaran and the connected qualifying phrases. As I have stated earlier in the judgment these persons would be " the relatives in the paternal line entitled to inherit " and they would be, in the context in which the word Sokkaran occurs, the relatives of Pitchammal. These persons are therefore clearly designated as they are the relatives of Pitchammal in the paternal line and entitled to inherit from Pitchammal.

What then is the share of the property that devolved on the group of " Sokkaran " on the death of Pitchammal without children ?

In considering this question it is necessary not to lose sight of the fact that the last will has been drafted by a layman who had only a colloquial knowledge of the language in which it was written. A literal translation of the document shows that the testator desired a husband's share to be set apart and the balance given to the Sokkaran. The testator contemplated the probability of Pitchammal's husband surviving Pitchammal and wished to provide for him in the event of Pitchammal dying without issue. The husband of Pitchammal was not a stranger to the family of the testator. He was the son of Mohideen Pathumma the sister of the testator. Reading the passage as a whole I have come to the conclusion that the testator has in the latter part of that passage created two separate *fidei commissa,* one in respect of a half share in favour of Pitchammal's husband and the other in respect of the remaining half share in favour of the group of Sokkaran. The learned Counsel for the plaintiff put forward his argument as follows :—The testator wanted " a husband's share according to religion to be set apart ". The husband's share must necessarily mean the share of a surviving husband. As Pitchammal's husband predeceased her there was no husband's share according to religion. Therefore, what was left, in the special circumstances of this case, after a husband's share was set apart was the entire property and that entire property went " to the benefit " of the Sokkaran. This is undoubtedly a very attractive argument. But on a very careful consideration I have reached the decision that the natural meaning of the words is in favour of the interpretation that the testator intended to create and did in fact create two separate *fidei commissa* as stated by me earlier. The position, then, is that the *fidei commissum* in favour of Pitchammal's husband had lapsed at the death of Pitchammal and

therefore a half share of the property became vested absolutely in her at her death. That half share has now devolved on the fourth defendant by virtue of the two deeds 4 D 2 and 4 D 3 (vide *Perera v. Mariano* [1]). The remaining half share which was to go "to the benefit" of the Sokkaran devolved on Abdul Raoof and Abdul Cader in equal shares on the death of Pitchammal.

I set aside the order of the District Judge and remit the case to the District Court with the direction that the rights of the parties to the action should be ascertained in accordance with the interpretation of the last will as given by me.

I direct that no party should be entitled to the costs of the proceedings in the District Court. The plaintiff and the first, second, third, and fifth defendants will be paid by the fourth defendant their costs of appeal in appeal No. 42. There will be no order as to costs of appeal in Appeals Nos. 43, 44, and 45. All future costs will be in the discretion of the District Judge.

DE KRETSER J.—I agree.

Set aside ; case remitted.